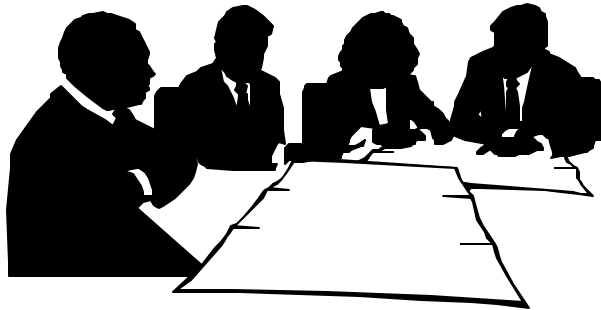


Eradicating NIMBY

An Attorney's Guide to Legal Issues
Regarding Neighborhood Living for
Individuals with Disabilities

Summer 2003



Tennessee Fair Housing Council

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Introduction

Often groups of individuals with disabilities, including individuals recovering from alcohol or substance abuse, live together with or without care providers in order to provide a support system for each other and cut down on living expenses. Such shared living arrangements are often referred to as group homes. While the most visible opposition to community housing for individuals with disabilities has been directed toward group homes, similar opposition exists with regard to assisted living homes occupied by as few as one individual with a disability and his or her care providers. Although we will primarily refer to group homes throughout the remainder of this guide, please keep in mind that all of the discussion regarding group homes is equally applicable to assisted living homes.

Many times group homes and/or assisted living homes for individuals with disabilities encounter difficulties when trying to locate in a residential neighborhood. Such difficulties can be divided into two primary categories: zoning obstacles and opposition from neighbors.

Fortunately, both federal and state law provide valuable tools for combating the opposition encountered by individuals with disabilities and supportive living organizations seeking to create community housing for individuals with disabilities. However, because few attorneys are knowledgeable about the housing rights of individuals with disabilities, many individuals with disabilities are unable to effectively use such laws in order to overcome obstacles and live in the housing of their choice.

Purpose of this Guide

The purpose of this Guide is to provide Tennessee attorneys with the basic knowledge necessary to provide legal assistance to individuals and organizations that are encountering opposition to siting a group home or assisted living home in a residential neighborhood.

Myths Underlying Opposition to the Siting of Group Homes in Residential Neighborhoods

In most cases opposition to the siting of group homes in residential areas can be traced to one of the following erroneous beliefs:

Myth 1. Housing for individuals with disabilities in a neighborhood decreases property values.

Myth 2. Housing for individuals with disabilities in a neighborhood

increases crime.

Myth 3. It is not fair for some neighborhoods to have a larger concentration of housing for individuals with disabilities than other neighborhoods.

Property Values

The most commonly stated concern of residents near a proposed group home is that property values will decline. However, the consensus among researchers, as well as the experience of communities across the country, demonstrates that homes for people with disabilities do not lower property values.¹

Crime Rates

The second most commonly stated concern is that homes for people with disabilities, especially those whose residents have mental illnesses, increase crime in nearby areas. However, research has consistently demonstrated that siting homes for individuals with disabilities within neighborhoods does not increase crime in those neighborhoods.²

Fair Share Arguments

¹See, DANIEL LAUBER, IMPACTS ON THE SURROUNDING NEIGHBORHOOD OF GROUP HOMES FOR PERSONS WITH DEVELOPMENTAL DISABILITIES. Report prepared for the Governor's Planning Council on Developmental Disabilities (1986) cited in Peter F. Colwell, Carolyn A. Dehring, and Nicholas A. Lash, *The Effect of Group Homes on Neighborhood Property Values*. LAND ECONOMICS 617 (November 2000). A summary of the Colwell/Dehring/Lash study appears online at the website of the Real Estate Counseling Group of America: <http://www.recga.com/newsletter.html>; See also, COMMUNITY RESIDENCES INFORMATION SERVICES PROGRAM (CRISP), THERE GOES THE NEIGHBORHOOD (1990); Robert L. Schonfeld, "Five-Hundred-Year Flood Plains" and Other Unconstitutional Challenges to the Establishment of Community Residences for the Mentally Retarded, 1 XVI FORDHAM URBAN LAW JOURNAL (1988).

² See, Schonfeld, *supra*. See also, Michael Dear and Robert Wilton, Crime & Safety: Fact & Fiction 3 (available from the Building Better Communities Network, <http://www.bettercommunities.org>); Lauber, *supra*.

The idea that it is not fair for some neighborhoods to have a higher concentration of housing for individuals with disabilities rests on the erroneous assumption that people with disabilities are a burden. However, the experiences of communities with homes for people with disabilities has shown that the effects most often cited by opponents do not occur.³

Clearly, there is no factual basis for the issues most commonly raised in opposition to the siting of group homes in residential neighborhoods. Moreover, individuals with disabilities deserve the same basic housing opportunities as other individuals. Accordingly, the remainder of this Guide will discuss laws which can be used to effectively combat opposition to the siting of group homes in residential neighborhoods and provide guidance for representing clients who face such opposition.

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Federal and State Law and Housing for People with Disabilities

Both state and federal law protect the rights of people with disabilities to live in appropriate housing, including housing in traditional residential neighborhoods. For example, Tennessee has a statewide zoning law that significantly limits the ability of city governments to use local zoning laws to prevent individuals with disabilities from living in residential neighborhoods. See, Appendices A and B. In addition, three federal civil rights statutes, the Fair Housing Act (FHA), the Rehabilitation Act, and the Americans with Disabilities Act (ADA) set limits on the zoning and other regulations that municipalities often attempt to place on housing for individuals with disabilities.

Tennessee Law

Tennessee has enacted the following zoning statute regarding discrimination against housing for people with disabilities:

For the purposes of any zoning law in Tennessee, the classification "single family residence" includes any home in which eight (8) or fewer unrelated mentally retarded, mentally handicapped or physically handicapped persons reside, and may include three (3) additional persons acting as houseparents or guardians, who need not be related to each other or to any of the mentally retarded, mentally handicapped or physically handicapped persons residing in the home.⁴

The provision above *overrides any local zoning regulations to the contrary*⁵ such that homes for fewer than eight people with disabilities and three caretakers must be treated as though they are single-family homes. For example, in *SMS Community House, Inc. v. Memphis and Shelby Co.*,⁶ the Tennessee Court of Appeals upheld the lower court's decision to vacate the local zoning board's refusal to permit a group to locate in a single-family zone, reasoning that the state's zoning law limits the jurisdiction of local zoning boards. Accordingly, group homes can generally locate in any residential neighborhood in Tennessee as a matter of right without seeking relief from zoning regulations, such as a variance

⁴ TENN. CODE § 13-24-102.

⁵ TENN. CODE ANN. § 13-24-103.

⁶1986 Tenn App LEXIS 3581.

or a special-use permit. In addition, such homes may not be subjected to any procedures (public hearings) or special requirements (such as expensive fire safety equipment) beyond those imposed upon other single-family homes.

In 2002, the Tennessee Court of Appeals made clear with its holding in *Pioneer Subdivision Homeowners Assoc. v. Professional Counseling Services*⁷ that Tennessee's zoning law also overrides a community's restrictive covenants. In *Pioneer*, the Court upheld the lower court's ruling that a group home must be allowed to locate within Pioneer Subdivision despite conflicting with the community's restrictive covenants and reversed the lower court's decision that required Professional Counseling Services to include two of the subdivision's residents on a committee selecting residents for the group home. While the majority held that imposition of such a requirement was invalid because Pioneer had not requested such relief in its complaint, Judge Lillard's Concurrence suggests that such a requirement would never be acceptable due to the risks to the privacy of the group home applicants. In fact, a similar requirement was found to violate the federal Fair Housing Act in *Township of West Orange v. Whitman*, 8 F. Supp. 2d 408 (D.NJ 1998).

Please note, however, that Tennessee's single-family classification does not apply to "such family residences wherein handicapped persons reside when such residences are operated on a commercial basis."⁸ In 1982, the Tennessee Court of Appeals discussed the meaning of commercial operation in *Nichols v. Tullahoma Open Door, Inc.*:⁹

[T]he statutory scheme did not seek to exclude a group home not operating for profit ... on the basis that it was operating as a commercial business simply because defendant received subsidies and rent to repay the mortgage loan and to pay staff members. No commercial purpose for the group home has been shown and we are of the opinion that the home is not operating on a commercial basis.¹⁰

The primary significance of *Nichols* is that only providers of housing for

eight or fewer people with disabilities that is operated on a non-profit basis will be protected by this state zoning law. However, providers of housing for individuals with disabilities who are for-profit or provide housing for more than eight people are protected by the Fair Housing Act, the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 and have the right to request relief from zoning requirements as a reasonable accommodation to their residents with disabilities. Reasonable accommodations and these additional federal statutes will be discussed in detail below.

In *Nichols*, the court also rejected a challenge by neighbors to the constitutionality of the state zoning statute, holding that the statute is not an unconstitutional taking of property,¹¹ does not usurp local governments' zoning powers¹² and does not violate equal protection by granting rights to people with disabilities that are not granted to others.¹³

Federal Law

A. The Fair Housing Act

Before 1988, the law regarding discrimination in housing against people with disabilities was a patchwork of state laws and local ordinances. While providers of housing for people with disabilities had some success in challenging local governments' discriminatory zoning decisions on constitutional grounds in federal court,¹⁴ and others filed lawsuits on the basis of local or state laws, there was no nationwide tool for fighting housing discrimination against individuals with disabilities.

When Congress passed the Fair Housing Amendments Act of 1988,¹⁵ the

¹¹ *Id.*

¹² *Id.* at 18.

¹³ *Id.*

¹⁴ See especially *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).

¹⁵ Pub. L. 100-430, 102 Stat. 1619 (1988). The legislative history of the Act makes extensive reference to the City of Cleburne case.

⁷ 2002 Tenn App. LEXIS 767

⁸ TENN. CODE ANN. § 13-24-104.

⁹ 640 S.W.2d 13 (Tenn. App. 1982)

¹⁰ *Id.* At 17.

federal Fair Housing Act¹⁶ was amended by adding protection from discrimination on the basis of "handicap" (which is legally synonymous with "disability," the term used throughout this Guide) and familial status, which means the presence or anticipated presence of children under 18 in a household. As part of the Fair Housing Act's application to discrimination in a wide variety of housing related transactions, the Act's prohibition against discrimination due to disability was expressly intended to address zoning decisions, restrictive covenants, and conditional or special-use permits "that have the effect of limiting the ability of [people with disabilities] to live in the residence of their choice in the community."¹⁷

The Fair Housing Act defines "handicap" as:

- (1) A physical or mental impairment which substantially limits one or more of a person's major life activities;
- (2) a record of having such an impairment; or
- (3) being regarded as having such an impairment.¹⁸

Theories of Discrimination

There are three major legal theories under the Fair Housing Act with special relevance to the siting of housing for people with disabilities. First, the Act broadly prohibits disparate treatment of people with disabilities by making it illegal to refuse to rent, sell or negotiate; to discriminate in "terms and conditions"; to lie about the availability of housing; or to "otherwise make unavailable or deny" housing to such individuals because of their disabilities. Second, the Act prohibits disparate impact discrimination through the enforcement of facially neutral rules or policies that have the effect of discriminating against individuals with disabilities. Third, the Act creates an affirmative obligation on local governments to provide a "reasonable accommodation" for housing for people with disabilities, usually in the form of a zoning change or waiver

¹⁶ 42 U.S.C. §§ 3601 *et seq.* The act now prohibits discrimination on the basis of race, color, national origin, religion, sex, disability and familial status.

¹⁷H.R. REP. NO. 711, 100th Cong., 2d Sess. 24 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2185.

¹⁸ 42 U.S.C. § 3602(h).

of other local policy or rule where necessary. These three broad categories are discussed in more detail below.

1. Discriminatory treatment

The Fair Housing Act prohibits a range of practices that would prevent a person with a disability from obtaining housing or engaging in a housing-related transaction because of his or her disability. For example, the law does not allow landlords to treat tenants unfairly simply because they have a disability. In addition, individuals with a disability are protected from such practices as discriminatory advertising, lying about the availability of housing, discriminatory financing or insurance underwriting, intimidation and harassment.

In the context of housing for groups of people with disabilities, discriminatory treatment has traditionally taken the form of private restrictive covenants or zoning regulations that specifically prohibit housing for people with disabilities. However, discriminatory treatment can also occur through discriminatory application or enforcement of a rule or policy, especially when such practices are accompanied by pressure from constituents based on the disabilities of the residents.

2. Discriminatory impact

A "discriminatory impact" (also variously known as "disparate impact," "adverse impact" or "discriminatory effect") occurs when an apparently neutral policy or procedure results in discrimination based on disability. The foundation for a discriminatory impact claim can be established by demonstrating that such a policy or procedure has a more burdensome effect on an individual due to his or her disability, or on people with disabilities in general. While showing evidence of discriminatory intent can be helpful, such evidence is not necessary in order to prevail on a discriminatory impact claim. However, a city can defend a discriminatory impact claim by showing that its actions furthered a legitimate governmental interest and that there was no alternative that would serve that interest with a less discriminatory effect.¹⁹ Courts then weigh the discriminatory impact of the policy against the city's justification for its policies.²⁰

¹⁹ See, e.g., *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp.1179, 1183 (E.D. NY 1993), *Tsombanidis v. City of West Haven*, 180 F.Supp 2d 262, 290 (D. Ct. 2001)

²⁰ *Id.*

3. "Reasonable accommodation"

A "reasonable accommodation" is a change or waiver of "rules, policies, practices, or services, when such accommodations may be necessary to afford a person with a disability an equal opportunity to use and enjoy a dwelling."²¹ Under this theory, people with disabilities are entitled to a favored status because they must be reasonably accommodated in ways that people without disabilities need not be.²²

On an individual basis, a reasonable accommodation might consist an apartment complex allowing a blind person to have a guide dog even though the complex has a policy against pets. As it applies to the siting of housing for people with disabilities, the Act's requirement of a reasonable accommodation has been held to require local governments to grant the zoning relief necessary to allow housing for people with disabilities to locate in an area zoned for single-family homes, even though other unrelated groups, such as students, may legally still be barred from such areas.²³ Application of the reasonable accommodation provision has also resulted in waivers of specific kinds of zoning requirements, such as density, spacing, signage and public hearing requirements.

B. Case law under the federal Fair Housing Act

As one might expect, much litigation followed passage of the 1988 amendments to the Fair Housing Act as providers of housing for people with disabilities sought to challenge barriers to siting such as "single-family" zoning that prevents a group home from locating where only groups of related people had been permitted;²⁴ spacing requirements prohibiting housing for people with disabilities within a certain distance of existing housing;²⁵ special safety and health rules that apply only to

²¹ 42 U.S.C. § 3603 (f)(3)(B)

²² ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION p. 11-71 (2000)

²³ *Id.*

²⁴ See especially *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995). This case will be discussed in more detail below.

²⁵ See, e.g., *N.J. Rooming & Boarding House Owners v. Asbury Park*, 152 F.3d 217 (3d Cir. 1998)

homes for people with disabilities;²⁶ burdensome procedural requirements for such homes;²⁷ state enforcement of private restrictive covenants,²⁸ and protests by neighbors.

Single-family zoning

Plaintiffs seeking to challenge the discriminatory zoning decisions of municipalities have had significant success in court. One of the most notable cases is *City of Edmonds v. Oxford House, Inc.*²⁹ The group home³⁰ in *City of Edmonds* was occupied by ten to twelve recovering drug addicts. The home had been denied permission to remain in a neighborhood zoned for single families because Edmonds' zoning ordinance defined "family" as an unlimited number of people who are related or up to five unrelated adults. Oxford House sued when the city failed to make a reasonable accommodation by allowing the group home to remain in the neighborhood despite its having more than five unrelated residents.

The city argued that language in the Fair Housing Act that exempts "reasonable occupancy restrictions" from scrutiny protected the city from a Fair Housing Act challenge. However, the Supreme Court ruled in favor of Oxford House, finding that Edmonds' rule was not an occupancy restriction, since occupancy restrictions "ordinarily apply uniformly to all residents of all dwelling units. Their purpose is to protect health and safety by preventing dwelling overcrowding."³¹ Under the restriction

²⁶ *Id.*

²⁷ *Id.*

²⁸ See, e.g., *Hill v. The Community of Damien of Molokai*, 911 P.2d 861 (N.M. 1996); *Martin v. Constance*, 843 F.Supp. 1321 (E.D. Mo. 1994)

²⁹ 514 U.S. 725 (1995)

³⁰ In its promotional materials, Oxford House describes itself as "a concept in recovery from drug and alcohol addiction. In its simplest form, an Oxford House describes a democratically run, self-supporting and drug-free group home." Published on the Internet at <http://www.oxfordhouse.org>. People recovering from addictions to controlled substances are considered "handicapped" under the Fair Housing Act. 24 C.F.R. § 100.201(d).

³¹ 514 U.S. at 733.

Edmonds tried to use to keep Oxford House out of a single-family residential zone, "(s)o long as they are related 'by genetics, adoption, or marriage,' any number of people can live in a house."³²

The Sixth Circuit issued a similar ruling in *Smith & Lee Associates v. City of Taylor*.³³ In *Smith & Lee*, the Court upheld the trial court's ruling that defendant city had violated the Fair Housing Act's reasonable accommodation requirement by failing to allow a group home to expand from six occupants to nine. While the city's zoning code only allowed for six individuals with disabilities to live together in a group home, the evidence at trial demonstrated that homes for fewer than nine residents were not economically feasible.³⁴

Other cases have involved the failure of municipalities to waive zoning regulations because of political pressure from neighborhood groups. For example, in *Oxford House, Inc. v. Town of Babylon*,³⁵ the city of Babylon had sought to evict an Oxford House facility from a single-family zone and denied Oxford House's request that the city grant a reasonable accommodation by altering the city's definition of "family" as applied to Oxford House. The Court held that because the accommodation requested by Oxford House was reasonable, the city's failure to grant the requested accommodation was a violation of the Fair Housing Act. Ordinarily, unless a home for people with disabilities is entitled to move into a neighborhood as a matter of right because it is consistent with the existing zoning, it is not necessarily illegal for a city to require all housing providers to seek a special-use permit, variance or some other zoning relief before locating. In *United States v. Village of Palatine*,³⁶ a group home sought to locate in a single-family residential zone without first seeking a variance, fearing that the required public hearing would ignite a "firestorm of vocal opposition" that would be harmful to the residents. The operators of the home argued that the routine administrative hoops placed before them constituted illegal discrimination and that the city should waive them as a reasonable accommodation.

³²*Id.* at 736.

³³ 102 F.3d 781(6th Cir. 1996)

³⁴ *Id.* at 796.

³⁵ 819 F. Supp.1179 (E.D. N.Y. 1993)

³⁶37 F.3d 1230 (7th Cir. 1994)

However, the court held that the home's interest in shielding its residents from public protest "does not outweigh the Village's interest in applying its facially neutral [zoning] law to all applicants for special use approval."³⁷ But the court also held that a home need not pursue a zoning variance when the variance process is required of housing for people with disabilities but not other housing, when the procedure is applied in a discriminatory way, or when the process is "manifestly futile"³⁸ as evidenced by the fact that a city appears to be in the habit of rejecting requests for zoning relief because of community opposition or other considerations.

A municipality is not required to grant a variance or some other zoning relief in every case. Representatives of a group home must show that a reasonable accommodation is necessary because of the disabilities of the actual or prospective residents, and that without the accommodation people with disabilities would be denied the opportunity to enjoy equal housing in the community of their choice. Further, a municipality can reject a request for zoning relief if it would constitute a "fundamental alteration" or "undue burden." While the opposition of neighbors is not enough justification, one court held that a city could reject a rezoning request if the housing sought to be located would cause traffic congestion or demands on drainage or sewerage.³⁹ Nevertheless, municipalities must prove that these kinds of legitimate zoning considerations are demonstrable and not hypothetical and that they are not motivated by an intent to discriminate.

Keep in mind that in light of the Tennessee zoning law previously discussed, it is not appropriate for a Tennessee city to require a housing provider that is covered by that state law to seek a special-use permit, variance or some other zoning relief before locating. Rather, such a provider is entitled to locate in a single-family zone as a matter of right, regardless of the local zoning code or a community's restrictive covenants. Only providers that are not covered by Tennessee's zoning law and whose proposed housing is incompatible with the local zoning code may be required to seek zoning relief such as a special-use permit or variance.

³⁷*Id.* at 1234.

³⁸*Id.*

³⁹*Hovsons, Inc., v. Township of Brick*, 89 F.3d 1096 (3d Cir. 1996)

Providers of housing for individuals with disabilities whose housing is consistent with the local zoning code can locate in a residential area as a matter of right. For example, one of the definitions of family in Davidson County's zoning code is "...a group of not more than three unrelated persons..." plus "...servants and temporary nonpaying guests...." See, Appendix B. Under that definition, a for-profit group home that houses up to three individuals and their caretakers can locate in a single-family zone as a matter of right. Accordingly, refusing to allow such a group home to locate in a residential neighborhood or requiring that the provider apply for zoning relief would constitute disparate treatment due to disability and be a violation of the federal Fair Housing Act.

Dispersion requirements

One of the fundamental principles behind the Fair Housing Act's protections of housing for people with disabilities is that the residents should be able to live in an integrated residential setting of their choice. However, this principle often has been thwarted by local dispersion requirements that mandate a certain amount of space between facilities. Fortunately, most courts, including the Sixth Circuit, have held that cities may not impose dispersion requirements on housing for people with disabilities.⁴⁰

The purported purpose of dispersion requirements is that such dispersion will aid integration of people with disabilities into communities and prevent segregation of housing for people with disabilities. However, according to the Sixth Circuit, such "integration is not a sufficient justification for maintaining permanent quotas under the FHA or the FHAA, especially where, as here, the burden of the quota falls on the disadvantaged minority....The FHAA protects the right of individuals to live in the residence of their choice in the community...If the state were allowed to impose quotas on the number of minorities who could move into a

⁴⁰See, e.g., *Larkin v. State of Michigan*, 89 F.3d 285 (6th Cir. 1996). *But see* *Familystyle of St. Paul v. City of St. Paul*, Minnesota, 923 F.2d 91 (8th Cir. 1991), holding that St. Paul's dispersion requirements were permissible because they promoted community integration instead of segregation and clustering. This is clearly the minority view. See also *Oconomowoc Residential Programs, Inc., v. City of Milwaukee*, 2002 U.S. Ap. LEXIS 15900 (7th Cir. 2002), holding that the city erred in not granting a waiver from a spacing requirement but explicitly not dealing with the legality of the requirement since it was not at issue in the litigation.

neighborhood in the name of integration, this right would be vitiated."⁴¹ Indeed, since society has "rejected spacing and density restrictions applied to families on the basis of race, religion and national origin,"⁴² it seems logical that society should similarly reject such restrictions on the basis of disability.

Special safety and procedural rules for housing for people with disabilities

Because of unsupported fears about community safety and concerns about resident safety, municipalities have often either barred housing for people with disabilities altogether or conditioned the siting of homes for people with disabilities on compliance with onerous safety requirements and other procedures not required of other congregate living arrangements. Courts that have dealt with this issue have generally struck down such conditions as discriminatory.

1. Measures for the safety of the community

In *Bangerter v. Orem City, Utah*,⁴³ the city had imposed two conditions on a group home for mentally retarded adults. First, the city told the home it must give assurances that the home would be supervised 24 hours a day. Second, the city ordered the home to establish a community advisory panel to deal with complaints from neighbors. Because the city imposed no such requirements on any other communal living arrangement, the court held that these requirements amounted to intentional discrimination under the Fair Housing Act that must be "justified by public safety concerns."⁴⁴

However, any such public safety concerns must be reasonable and not predicated on stereotypes about people with disabilities. Although the Fair Housing Act does not protect individuals "whose tenancy would constitute a direct threat to the health or safety of other individuals or

⁴¹Larkin, 89 F.3d at 291.

⁴²CAMERON WHITMAN AND SUSAN PARNAS. FAIR HOUSING: THE SITING OF GROUP HOMES FOR THE DISABLED AND CHILDREN 17 (1999), available at <http://www.bazelon.org/cpfha/grouphomes.html>

⁴³46 F.3d 1491 (10th Cir. 1995)

⁴⁴*Id.* at 1503

whose tenancy would result in substantial physical damage to the property of others,"⁴⁵ municipalities may not base decisions about housing for people with disabilities simply because of an assumption that people with disabilities are dangerous. For example, in *Township of West Orange v. Whitman*,⁴⁶ a court rejected the township's and local homeowners' claims that they should be consulted before housing for people with mental illness is allowed to locate in their neighborhoods and their request to receive information on the histories of people placed in this housing.

2. Measures to protect the residents

Municipalities may not prescribe burdensome safety requirements for housing for people with disabilities unless they are tailored to the specific population in the housing. In *Marbrunak, Inc., v. City of Stow, Ohio*,⁴⁷ the city's zoning code included "nearly every safety requirement that one might think of as desirable to protect persons handicapped by any disability - mental or physical."⁴⁸ Because the city's zoning code created "an onerous burden which has the effect of limiting the ability of these handicapped individuals to live in the residence of their choice,"⁴⁹ the Sixth Circuit held that the ordinance was discriminatory on its face.

Restrictive covenants

Covenants that restrict neighborhoods to residential uses only are vulnerable to attack under the Fair Housing Act where they are used as a barrier to housing for people with disabilities. In at least one case, *Martin v. Constance*,⁵⁰ a Missouri court held that neighbors violated the Fair Housing Act when they sued the state to bar a group home, claiming the

home would be in violation of a neighborhood covenant restricting homes to single-family occupancy. The court held the neighborhood had discriminatory intent when it sued to stop the home; that the covenant had a discriminatory effect on housing for people with disabilities; and that the neighborhood failed to reasonably accommodate the group home when it filed suit to enforce its covenants. (The First Amendment implications of homeowner lawsuits to block housing for people with disabilities will be discussed further below.)

In *Martin*, the court's decision relied heavily on legislative history and the regulations promulgated by the U.S. Department of Housing and Urban Development, which prohibit "(e)nforcing covenants or other deed, trust, or lease provisions which preclude the sale or rental of a dwelling to any person because of race, color, religion, sex, handicap, familial status, or national origin."⁵¹

Free speech issues

Homeowners and other community members have a First Amendment right to speak out against the development of housing for people with disabilities or other housing to which they object. Such protected activity includes petitioning elected officials to stop the development of such housing.⁵² Protected activity also includes filing lawsuits to block development, unless the suits are filed for an illegal objective; without a reasonable basis in law or fact; and with an improper motive. Lawsuits that are unprotected by the First Amendment can also be violations of the Fair Housing Act.⁵³

⁴⁵42 U.S.C. 3604(f)(9).

⁴⁶8 F. Supp. 2d 408 (D.NJ 1998).

⁴⁷974 F.2d 43 (6th Cir. 1992)

⁴⁸*Id.* at 46-48.

⁴⁹*Id.* at 48.

⁵⁰843 F. Supp. 1321 (E.D. Mo. 1994). See also, e.g., *Hill v. The Community of Damien of Molokai*, 911 P.2d 861 (N.M. 1996); *Broadmoor San Clemente Homeowners Ass'n v. Nelson*, 30 Cal. Rptr.2d 316 (Cal. App. 1994); *Deep East Regional Mental Health and Mental Retardation Services v. Kinnear*, 877 S.W.2d 550; *U.S. v. Wagner*, 940 F. Supp. 972 (N.D. Texas 1996)

⁵¹24 C.F.R. 100.80 (b)(3).

⁵²See, e.g., *White v. Lee*, 27 F.3d 1214 (9th Cir. 2000)

⁵³*U.S. v. Wagner*, 940 F. Supp. 972 (N.D. Texas 1996). See also *White*, 27 F.3d at 1232 (a lawsuit "can amount to a discriminatory housing practice only in the event that (1) no reasonable litigant could have realistically expected success on the merits, and (2) the plaintiffs filed the suit for the purpose of coercing, intimidating, threatening, or interfering with a person's exercise of rights protected by the FHA."); *Schroeder v. De Bertoloe*, 879 F. Supp. 173, 178 (D. P.R. 1995) ("plaintiffs' allegations that defendants ... brought groundless civil claims against decedent, and threatened to bring groundless criminal charges against her ... are sufficient to state a claim under the FHAA.).

Neighbors *do not* have the right to engage in direct harassment of residents or other activity not protected by the First Amendment. They also may not physically obstruct construction or trespass in an attempt to slow or halt development. Finally, although citizens have the right to urge their public officials to block housing for people with disabilities, those officials do not have a right to act on those requests by making a decision that discriminates or otherwise violates state or federal law.

C. Other relevant federal statutes

Title II of the Americans with Disabilities Act⁵⁴ ("ADA") and Section 504 of the Rehabilitation Act of 1973⁵⁵ ("Section 504") can also come into play in issues of zoning for housing (or other facilities) for people with disabilities.

The ADA provides, in relevant part:

No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity.⁵⁶

Likewise, Section 504 applies to recipients of federal funds, which includes almost all cities by virtue of their receipt of federal grants and entitlement programs, such as Community Development Block Grant funds. It provides:

No otherwise qualified individual with a disability ... shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. ...⁵⁷

The zoning function of a state or local government is a "service," "program" or "activity" covered by the ADA and Section 504.⁵⁸ Thus, discriminatory application of zoning rules and discriminatory zoning decisions can also be challenged under either of these statutes. While the Fair Housing Act covers only disputes over "dwellings," the ADA and Section 504 cover a broad range of services for people with disabilities, such as treatment or drop-in centers, that may need zoning relief in order

⁵⁴42 U.S.C. §§ 12131-12165 (1994).

⁵⁵29 U.S.C. § 794 (1994).

⁵⁶42 U.S.C. § 12132 (1994).

⁵⁷29 U.S.C. § 794(a) (1994)

⁵⁸See, e.g., *Innovative Health Systems, Inc., v. City of White Plains*, 117 F.3d 37 (2nd Cir. 1997); *MX Group Inc., v. City of Covington*, 2002 U.S. App. LEXIS 11249 (6th Cir. 1998).

to locate in an appropriate location.

Evaluating and dealing with NIMBY disputes

Careful evaluation of the facts in a dispute between a neighborhood and a home for people with disabilities is necessary for the most efficient and legally correct resolution of such a dispute. See Appendix C for suggested Questions for Initial Processing.

For example, it will likely be necessary to handle a case where a group home meets the city's definition of family very differently from a case where a group home does not meet the city's definition of family and is not covered by the State's zoning law because it is operated by a for-profit service provider. In the former instance, it might be appropriate for the attorney representing the home simply to call or write to the city zoning administrator and explain that treating individuals with disabilities differently than individuals without disabilities is a violation of the FHA, demanding that the home be allowed to locate in a neighborhood setting as a matter of right, and, if that demand is not met, filing an administrative complaint or lawsuit.

In the latter instance, however, it would probably be appropriate for the home to begin by requesting a variance or special use permit, participating in a zoning board hearing and a zoning appeal, and only filing an administrative complaint or lawsuit in the event that the request is denied at the zoning appeal hearing.

When representing a client with a NIMBY complaint, it can be very helpful to keep a record of all responses from city officials, neighbors, and other potential defendants. For example, zoning hearings are often fertile ground for learning the reasons underlying opposition to a group home. A record of discriminatory statements and/or actions by those opposing the group home may be especially useful in proving discriminatory intent.

The statute of limitations is one year for filing a Fair Housing Act complaint with HUD and is two years for filing such a complaint in federal court. While the statute of limitations applicable to the Fair Housing Act begins to run on the date of the last act of discrimination, it may be possible to seek relief for earlier acts of discrimination under a "continuing violations theory." So, for example, if the city denied a provider's application for a special use permit over two years ago and then acted on that provider's appeal 18 months ago, both discriminatory acts could likely be included in a complaint filed in federal district court today.

Under the Fair Housing Act, it is not necessary for a plaintiff to exhaust

administrative remedies before filing a private lawsuit. In addition, it is generally permissible for a plaintiff to file both an administrative complaint and a private lawsuit.⁵⁹ However, a party may not file a private lawsuit after his or her HUD complaint reaches administrative hearing or after such HUD complaint has been resolved through entry of a conciliation agreement.⁶⁰ In situations where both an administrative and court complaint are pending, the HUD proceeding will terminate as soon as civil trial begins.⁶¹ Similarly, if a final judgment is entered by a HUD ALJ, then the private action will terminate.

Conclusion

We hope that the information in this Guide provides you with the framework necessary to assist individuals and organizations that are encountering opposition to siting a group home or assisted living home in a residential neighborhood. Your legal assistance is vital to assuring that individuals with disabilities have the same broad range of housing choices as everyone else.

⁵⁹ 42 U.S.C. § 3613(a)(2)

⁶⁰ 42 U.S.C. § 3613(a)(2), 42 U.S.C. § 3613(a)(3)

⁶¹ 42 U.S.C. § 3610(g)(4), 42 U.S.C. § 3612(f)

Appendix A

Tennessee statutes regarding housing for individuals with disabilities

13-24-101. Purpose - Meaning of “mentally handicapped.”

(a) It is the purpose of this part to remove any zoning obstacles which prevent mentally retarded, mentally handicapped or physically handicapped persons from living in normal residential surroundings.

(b) As used in this part, “mentally handicapped” does **not** include persons who are mentally ill **and**, because of such mental illness, pose a likelihood of serious harm as defined in **§ 33-6-104**, **or** who have been convicted of serious criminal conduct related to such mental illness. (emphasis added)

13-24-102. Homes in which mentally retarded, mentally handicapped or physically handicapped persons reside classified as single family residence.

For the purposes of any zoning law in Tennessee, the classification “single family residence” includes any home in which eight (8) or fewer unrelated mentally retarded, mentally handicapped or physically handicapped persons reside, and may include three (3) additional persons acting as houseparents or guardians, who need not be related to each other or to any of the mentally retarded, mentally handicapped or physically handicapped persons residing in the home.

13-24-103 Precedence over other laws.

This part takes precedence over any provision in any zoning law or ordinance in Tennessee to the contrary.

13-24-104. Inapplicability to commercial residences for handicapped persons.

This part does not apply to such family residences wherein handicapped persons reside when such residences are operated on a commercial basis.

33-1-101. Definitions.

“**Mentally ill individual**” means an individual who suffers from a psychiatric disorder, alcoholism, or drug dependence, but excluding an individual whose only mental disability is mental retardation.

33-6-104. “Substantial likelihood of serious harm” defined – Standards for commitment to involuntary care and treatment.

(a) IF AND ONLY IF

(1)(A) a person has threatened or attempted suicide or to inflict serious bodily harm on such person,

OR

(B) the person has threatened or attempted homicide or other violent behavior, OR

(C) the person has placed others in reasonable fear of violent behavior and serious physical harm to them, OR

(D) the person is unable to avoid severe impairment or injury from specific risks, AND

(2) there is a substantial likelihood that such harm will occur unless the person is placed under involuntary treatment,
THEN

(3) the person poses a "substantial likelihood of serious harm" for purposes of § 33-6-103 and this section.

Appendix B

Definitions of "family" contained in local zoning codes in Tennessee

(Davidson county, Knox County, Chattanooga, Memphis/Shelby County)

Davidson County

17.04.060

"Family" means one of the following:

1. An individual, or two or more persons related by blood, marriage or law, or, unless otherwise required by federal or state law, a group of not more than three unrelated persons living together in a dwelling unit. Servants and temporary nonpaying guests having common housekeeping facilities with a family are a part of the family for this code;
2. A group of not more than eight unrelated mentally retarded, mentally handicapped (excluding the mentally ill) or physically handicapped persons, including two additional persons acting as houseparents or guardians, living together as a single housekeeping unit in accordance with Tennessee Code Annotated 13-24-102.

Knox County

In its Zoning Ordinances, Knox County defines family as "several individuals living together and cooking on the premises as a single housekeeping unit, together with all necessary employees of the family."
Article 2, Definitions.

City of Chattanooga

Family: A group of one or two persons or parents with their direct descendants and adopted and foster children, together with not more than three persons not so related, living together in a room or rooms comprising a single housekeeping unit. Every additional group of five or less persons living in such housekeeping unit shall be considered a separate family.

City of Memphis and Shelby County

Family: In addition to customary domestic servants, either:

- (a) An individual or two (2) or more persons related by blood, marriage or adoption, maintaining a common household in a dwelling unit; or

(b) A group of not more than four (4) persons who are not related by blood, marriage or adoption, living together as a common household in a dwelling unit; or

(c) A group of eight (8) or fewer unrelated mentally retarded, mentally handicapped or physically handicapped persons, (as certified by any duly authorized entity including governmental agencies or licensed medical practitioners), and may include three (3) additional persons acting as houseparents or guardians, who need not be related to each other or to any of the mentally retarded, mentally handicapped or physically handicapped persons in the group, living together in a residence licensed, where required by law, by a duly authorized governmental agency, or in other instances, approved by the director of the Memphis and Shelby County Office of Planning and Development who shall provide any such applicant with written notice of his determination. This (c) definition of "family" does not apply to residences wherein mentally retarded, mentally handicapped or physically handicapped persons reside when such residences are operated on a commercial basis.

Appendix C

Questions for initial processing of complaint that group home's location in Tennessee neighborhood is opposed

1. Is group home for individuals with disabilities?

If YES, then group home is covered by the Fair Housing Act - proceed to **2.**

If NO, then group home is NOT covered by the Fair Housing Act - **STOP.**

2. Is group home noncommercial?

If YES, then group home may be covered by TN zoning statute - proceed to **3.**

If NO, then group home is NOT covered by TN zoning statute BUT may be covered under local zoning code's definition of family - proceed to **4.**

3. Is group home for eight or fewer individuals with disabilities plus three or fewer caretakers?

If YES, then group home is covered by TN zoning statute and is allowed in single-family zone as a matter of right regardless of local zoning code provisions. A special use permit may NOT be required.

If NO, then group home is NOT covered by TN zoning statute BUT may be covered under local zoning code's definition of family, proceed to **4.**

4. Is group home covered under local zoning code's definition of family?

If YES, then group home is allowed in single-family neighborhood as a matter of right. Any attempts to distinguish between group homes for individuals with disabilities and homes for others covered by local code's definition of family are unlawful discrimination prohibited by Fair Housing Act. Special use permit may NOT be required.

If NO, under FHA the group home must be allowed to locate in single-family neighborhood unless there is an undue financial or administrative burden. Special use permit MAY be required.

Appendix D

Additional resources

Tennessee Department of Mental Health and Developmental Disabilities.
Creating Homes Initiative Strategic Plan.

The American Bar Association Steering Committee on the Unmet Legal Needs of Children and Commission on Homelessness and Poverty.
NIMBY: A Primer for Lawyers and Advocates.

Schwemm, Robert G. **Housing Discrimination: Law and Litigation.**

Relman, John P. **Housing Discrimination: Practice Manual.**

Resource Document Series from The Campaign for New Community.
Handbooks:
Seeing People Differently: Changing Constructs of Disability and Difference.
Accepting and Rejecting Communities.
Case Studies of Successful and Unsuccessful Siting Strategies.
Community Relations: A Resource Guide.

Research Reports:
Hierarchies of Acceptance.
Building Supportive Communities.
Factors Influencing Community Acceptance: Summary of the Evidence.
The Question of Property Values.
Crime and Safety: Fact and Fiction.

Whitman, Cameron, and Susan Parnas. **Fair Housing: The Siting of Group Homes for the Disabled and Children.** A joint publication of the National League of Cities and the Coalition to Preserve the Fair Housing Act. Available at <http://www.bazelon.org/cpfha/grouphomes.html>

Stein & Schonfield, Bazelon Center for Mental Health Law. **Digest of Cases and Other Resources on Fair Housing for People with Disabilities.**

The Fair Housing Act
http://www.fairhousing.com/legal_research/fha/

The National League of Cities
<http://www.nlc.org/>

The Building Better Communities Network
<http://www.bettercommunities.org>

National Fair Housing Advocate Online
<http://www.fairhousing.com>

GCA Strategies
<http://www.gcastrategies.com>

Bazelon Center for Mental Health Law
<http://www.bazelon.org>